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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 142

A. J. DELANEY, PETITIONER

v.

NAT ROGAN, COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH COLLECTION DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of California (R. 25–31) is unreported. The opinions in the Circuit Court of Appeals (R. 282–308) are reported in 110 F. (2d) 336.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1940 (R. 309). The petition for certiorari was filed on June 11, 1940. The jurisdiction of this Court is invoked under Section 240

(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a particular block of stock was acquired by the taxpayer before or after July 29, 1927, the effective date of Section 161a of the California Civil Code.

STATUTE INVOLVED

California Civil Code (1937 edition):

> SEC. 161a. *Interests in community property.*—The respective interests of the husband and wife in community property during the continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

STATEMENT

During the tax year 1930, taxpayer received $126,500 as dividends on 1,100 shares of stock of Delaney Petroleum Company (R. 54). In his income tax return for that year, he included only one-half of this amount in gross income, on the ground that the dividends constituted community income (R. 44). The Commissioner determined that the dividends were the taxpayer's separate income (R. 49) and treated them accordingly in

assessing a deficiency against the taxpayer. The correctness of the Commissioner's determination depends upon whether the taxpayer acquired the stock before July 29, 1927, the effective date of Section 161a of the California Civil Code, *supra*. The District Court decided that the stock was acquired on September 14, 1927 (R. 54) and, consequently, held against the respondent. The court below reversed, holding that the stock had been acquired on or before June 21, 1927 (R. 289).

The evidence[1] establishes, without conflict, the following primary facts:

Taxpayer and his wife were married in 1907 and were living together as husband and wife and as residents of California in 1930 (R. 42).

The Delaney Petroleum Company was organized in 1926 by C. M. Weatherwax, H. C. Hunt, Alvah M. Kaime, and taxpayer. The company was authorized to issue and did issue 5,000 shares of stock of a par value of $100 each (R. 51). Taxpayer subscribed for 1,224 shares of this stock on February 9, 1927, and they were issued to him on or before June 21, 1927 (R. 52, 101). Of the 1,224 shares issued to taxpayer, 124 shares were transferred by him prior to 1930 and are not here involved. The remaining 1,100 shares were still held by the taxpayer in 1930 (R. 101).

[1] The evidence consists of a stipulation of the parties (R. 64–81), fifteen exhibits attached to and made part of the stipulation (R. 82–118), other documentary evidence, and the testimony of six witnesses, including the taxpayer.

All of the Delaney Petroleum Company shares were fully paid for before they were issued. The 1,100 shares here involved were paid for with money loaned to taxpayer, without security, by Messrs. Weatherwax, Hunt and Kaime (R. 53, 91–95). These loans were repaid by the taxpayer on September 14, 1927, from the proceeds of a $125,000 bonus paid to him by the Company (R. 53, 54). The 1,100 shares were at no time issued or transferred to Messrs. Weatherwax, Hunt and Kaime, and they never claimed ownership of the shares. To the contrary, both before and after the loans were repaid, they recognized the taxpayer as the owner of the stock (R. 110, 117).

In addition to these undisputed facts, there was testimony that the taxpayer entered into an oral agreement with his three associates, who loaned him the money, not to acquire the stock until the loans were repaid. The District Court so found (R. 53). The Circuit Court of Appeals, in reversing the District Court, held (1) that there was no evidence of any such agreement; (2) that if there was such an agreement, it was not complied with but was disregarded, and, (3) that whether or not there was such an agreement, the undisputed facts show that the taxpayer acquired the stock on or before June 21, 1927 (R. 287).

ARGUMENT

There is no dispute that, if the stock was acquired before the enactment of Section 161a of

the California Civil Code on July 29, 1927, the income was taxable to the husband (*United States* v. *Robbins,* 269 U. S. 315), while if it was acquired after that date, the income was taxable one-half to the husband and one-half to the wife (*United States* v. *Malcolm,* 282 U. S. 792). The sole issue in the case, therefore, is when title to the stock passed to the taxpayer. This is obviously not a question which warrants the attention of this Court.

Petitioner urges issuance of the writ on the sole ground that the court below disregarded the dictates of Rule 52 (a) of the Federal Rules of Civil Precedure by substituting its own findings for those of the District Court. The contention is not that Rule 52 (a) was misconstrued but simply that the decision below, on the particular facts presented in this case, constitutes a misapplication of the Rule. Even if this contention were sound, it would clearly present no occasion for further review.

But the contention is without merit. The court below, although indicating its view that some of the primary findings of the District Court were without support in the record, did not find it necessary to disturb those findings. It simply held that the primary findings did not support the ultimate determination that title to the stock passed to the petitioner only on September 14, 1927. The question of when title to the stock passed is a question of law, or at best a mixed question of law and fact, as to which

the appellate court could properly exercise its own judgment. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481.

CONCLUSION

The decision below presents no conflict. The issues raised are limited to the particular facts of this case and involve no question of general application. The petition should, therefore, be denied.

Respectfully submitted.

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